No. 83-578

In The

Supreme Court of the United States

October Term, 1983

ALASKA LAND TITLE ASSOCIATION, SECURITY TITLE AND TRUST COMPANY OF ALASKA, ALASKA TITLE GUARANTY COMPANY, BROKERS TITLE COMPANY, LAWYERS TITLE INSURANCE AGENCY, INC., SAFECO TITLE AGENCY, INC., FAIRBANKS TITLE AGENCY, VALLEY TITLE AND ESCROW COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, TRANSAMERICA TITLE INSURANCE COMPANY, RICHARD L. BOYSEN and JACK WHITE COMPANY,

Petitioners,

vs.

STATE OF ALASKA, THEODORE M. PEASE, JR., and CLAIRE V. PEASE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT STATE OF ALASKA'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. (a) Does 48 U.S.C.A. 321(a) (1952) authorize the Secretary of Interior to create public road easements in Alaska?

   (b) If the answer to (a) is yes, does the Alaska Right-of-Way Act of 1966, ch. 92 S.L.A. 1966 operate to prohibit the State of Alaska from claiming public road easements created by 48 USC 321(a)?

2. Does 43 U.S.C.A. § 1166 (1964) bar the State of Alaska from utilizing previously created public road easements or reservations in Alaska that do not actually appear on the face of patents issued for lands in Alaska?

3. Does publication in the Federal Register of a public land order creating public road easements in Alaska afford constructive notice of these public road easements?

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OPINION BELOW

The Alaska Supreme Court decision and judgment that is the subject of the petitioners' petition for writ of certiorari is found in *State v. Alaska Land Title Association*, 667 P. 2d 714 (Alaska 1983).

STATEMENT OF THE CASE

Title insurance companies in Alaska have from time to time apparently been issuing title insurance policies to landowners that failed to note the existence of highway rights-of-way in Alaska that were created by certain public land orders. In order to escape liability for these omissions, these title companies decided to launch an unprecedented attack on the effectiveness of four public land orders that are responsible for the creation of almost 80% of the public highway rights-of-way in Alaska. Thus in early February of 1979, an association representing various title companies, individual title insurance companies and several landowners brought a declaratory judgment action in Alaska Superior Court against the State of Alaska, the Municipality of Anchorage and Theodore and Claire Pease. Nine claims for relief were presented. *See State v. Alaska Land Title Association,* 667 P. 2d 714, 716 (Alaska 1983).

Three of the title companies' claims (the second, third and eighth claims) were predicated on the premise that the Alaska Right-of-Way Act of 1966, ch. 92, 92 SLA 1966 precluded the state from claiming public road easements created by Public Land Order 601, 14 Fed. Reg. 5048 (1949) and Department Order 2665, 16 Fed. Reg. 10,752 (1951). Three other claims (the fifth, sixth and seventh claims) were predicated on the premise that publication of public land orders in the federal register does not impart constructive notice under Alaska law of the public road rights-of-way created by these land orders. The title companies' last claim (the ninth claim) was predicated on the premise that a previously created public road

reservation affecting land in Alaska that does not appear on the face of a patent issued for land in Alaska is null and void.[1] The title companies' claims, it should be noted, called into question the validity of virtually 80% of Alaska's public roads.

All parties moved for summary judgment as to all claims. The superior court denied the state's motion and granted the plaintiff title companies' motion as to their claims based on the Alaska Right-of-Way Act of 1966, *i. e.*, the plaintiff title companies' second, third and eighth claims. The superior court granted the Peases' motion and ruled against Transamerica's first claim. *See* footnote 1. The superior court made no ruling concerning the plaintiff title companies' fourth, fifth, sixth, seventh and ninth claims for relief. *See* memorandum of decision dated May 7, 1980 and judgment dated May 27, 1980 attached respectively as appendices A-1 and A-2 to the title company petitioners' petition for a writ of certiorari.

The State of Alaska appealed the superior court's judgment relating to the title companies' second, third and eighth claims to the Alaska Supreme Court. In its appellate briefs, the state argued that the Right-of-Way Act

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[1]The title companies' first claim asserted that the title insurance policy issued by the plaintiff Transamerica Title Insurance Company to the Peases excluded from coverage any right-of-way created pursuant to Public Land Orders 601, 757, 1613 and Department Order 2665. Their fourth claim asserted that the original patentee of the land owned by the plaintiff Hanson and Associates had made a homestead entry prior to the effective date of PLO 601 and sought a declaration that no through road easement under PLO 601 could be claimed by the State of Alaska or the City of Anchorage.

of 1966 is, on its face, applicable only to reservations created by 48 U. S. C. A. § 321(d) (1952) and that the easements created by DO 2665 and PLO 601 were established, respectively, under the authority of 48 U. S. C. A. § 321(a) (1952) and Executive Order 9337, 8 Fed. Reg. 5516 (1943).

The plaintiff title companies cross-appealed to the Alaska Supreme Court claiming that the superior court should have granted them judgment on their fourth, fifth, sixth, seventh and ninth claims for relief. The plaintiff Transamerica Title Company appealed the denial of its first claim for relief.

In a written decision dated May 27, 1983 and reported at 667 P. 2d 714, the Alaska Supreme Court made the following rulings:

> With respect to the plaintiff title companies' second, third and eighth claims for relief, the court held the following:
>
> > The Alaska Right-of-Way Act of 1966 is applicable only to reservations created by 48 U. S. C. § 321(d) and that easements created by DO 2665 "were established under the authority of § 321(a), not 321(d)." In addition, PLO 601 does not depend for its existence on 48 U. S. C. § 321(d). "PLO 601 was issued pursuant to Executive Order 9337 . . ." This holding, in effect, denied the title companies' second, third and eighth claims for relief. *See State v. Alaska Land Title Association,* 667 P. 2d 714, 721, 724 (Alaska 1983).
>
> With respect to the plaintiff title companies' fifth, sixth, seventh and ninth claims for relief, the court held the following:

(1) Publication of "land orders in the Federal Register imparted constructive notice and served to preclude subsequent innocent purchaser status." This holding, in effect, denied the title companies' fifth and sixth claims for relief. *See State v. Alaska Land Title Association,* 667 P. 2d 714, 725, 726 (Alaska 1983).

(2) Publication of land orders in the Federal Register "imparts constructive notice of the easements they create, (and) that notice makes plaintiffs' reliance unreasonable. Thus, the estoppel claim lacks merit." This holding in effect, denied the title companies' seventh claim for relief. *See State v. Alaska Land Title Association,* 667 P. 2d at 726.

(3) By operation of law, "land conveyed by the United States is taken subject to previously established rights-of-way where the instrument of conveyance is silent as to the existence of such rights-of-way." The effect of this holding was to deny the title companies' ninth claim for relief.[2] *State v. Alaska Land Title Association,* 667 P. 2d at 726, 727.

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[2]With respect to the plaintiff Transamerica's first claim for relief, the Supreme Court held that Transamerica is liable under its policy to the Peases, thereby affirming the superior court's ruling denying Transamerica's first claim for relief. With respect to the plaintiff title companies' fourth claim for relief, the Supreme Court held that PLO 601 did not create a road reservation that affected the plaintiff Hanson and Associates property. This holding, in effect, granted the title companies' fourth claim for relief.

SUMMARY OF REASONS FOR DENYING WRIT

The decision of the Alaska Supreme Court that is the subject of the title companies' petition for a writ of certiorari is in complete accord with both state and federal law. Moreover, the first and third questions presented involve matters that properly turn on the application of state law while the second question was decided in full harmony with federal law. None of the three questions presented for review by the petitioner title companies, therefore, rise to the level of a substantial federal question.

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REASONS FOR DENYING WRIT

(a) The First Question Presented by the Petitioners is not a Substantial Federal Question.

The first question raised by the title company petitioners grows out of the position they urged before the Alaska Supreme Court to the effect that the Alaska Right-of-Way Act of 1966, ch. 92 SLA 1966 concerns itself with public road easements created by 48 U. S. C. A. 321(a) (1952). The title companies were forced to take this position because of their argument that the Alaska Right-of-Way Act of 1966 precluded the State of Alaska from utilizing public road easements created by Department Order 2665.[3] As the last sentence of section 1 of DO 2665 clearly

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[3]DO 2665, promulgated on October 19, 1951, is set out in the appendix to the title company petitioners' petition for a writ of certiorari at B-15 through B-17.

indicates, this order was issued under the authority of 48 U. S. C. 321(a).[4]

In spite of the title company petitioners' claim, the Alaska Right-of-Way Act of 1966 refers on its face only to easements or rights-of-ways acquired "under the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418". Sec. 5 of the Act of June 30, 1932 was created by 61 Stat. 418 (1947); it now appears as 48 U. S. C. A. § 321(d) (1952). *See* section 2 of the Alaska Right-of-Way Act of 1966 set out in *State v. Alaska Title Association*, 667 P. 2d 714, 720 (Alaska 1983) at note 7 and in the appendix to the title company petitioners' petition for a writ of certiorari at B-17 and B-18.

In order to evade this textual contradiction of their position, the title companies were forced to retreat to a fall back position. That is, they were forced to argue that 48 U. S. C. § 321(a) provides no authority for the Secretary of Interior to create public road easements and that,

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[4]48 U.S.C.A. § 321(a) (1952) directed the Secretary of the Interior to "execute or cause to be executed all laws pertaining to the construction and maintenance of roads and trails and other works in Alaska, heretofore administered by said board of road commissioners under the direction of the Secretary of War. . ." 48 U.S.C. 321(a) is set out in the appendix to the petitioner title companies' petition for a writ of certiorari at B-6. One of the laws "pertaining to the construction and maintenance of roads" in Alaska that 48 U. S. C. § 321(a) directed the Secretary of Interior to execute is 48 U.S.C.A. § 322 (1952), a statute that was originally enacted in 1905. This statute grants the Secretary the power to ". . . locate, lay out, construct and maintain wagon roads and pack trails. . ." in Alaska. 48 U. S. C. 322 is reproduced in the appendix section of this brief.

as a consequence, all references to 48 U. S. C. § 321(a) must, by implication, refer to 48 U. S. C. § 321(d). *See* title companies' petition for a writ of certiorari to the Supreme Court of the State of Alaska in this matter at pp. 13-14.

It is difficult to see much substance in this argument. And, by the same token, it is equally difficult to see how this question rises to the level of a substantial federal question. As the Alaska Supreme Court pointed out in *State v. Green,* 586 P. 2d 595 (Alaska 1978), 48 U. S. C. § 321(a) and 48 U. S. C. § 321(d) are two entirely distinct statutes: § 321(a) was enacted some 15 years before § 321 (d) and, in addition, both statutes concern themselves with markedly different subjects:

> In the case at bar, the state does not rely upon 48 U. S. C. § 321d (1952); instead, it bases its argument exclusively on 48 U. S. C. § 321a (1952) and Secretarial Order No. 2665. The statute involved in *Crosby* was enacted July 24, 1947; the statute which authorized Secretarial Order No. 2665 had been enacted 15 years earlier on June 30, 1932. In addition, the subjects addressed by § 321a differ markedly from those addressed by § 321d. Section 321a governs the transfer of road construction and maintenance functions to the Secretary while section 321d requires certain right-of-way reservations to be included in "all patents for lands hereafter taken up, entered, or located in the Territory of Alaska."

State v. Green, 586 P. 2d 595, 600, 601 (Alaska 1978).

The only reasonable conclusion that can be drawn from the above is that 48 U. S. C. 321(a) does indeed authorize the Secretary of Interior to create public road easements in Alaska. The Alaska Supreme Court, then, was on solid ground when it ruled at p. 721 of its opinion

in *Alaska Land Title Association* that "easements established by DO 2665 were established under the authority of section 321(a), not section 321d."[5]

Moreover, the Alaska Supreme Court's ruling on this question relates primarily to the nature of public road easements in Alaska and, in particular, with the relationship of these public road easements to a state statute, *i.e.*, the Alaska Right-of-Way Act of 1966.[6] In addition, the ruling does not conflict with any federal decisions. Since the state court ruling on this question concerns itself pri-

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[5]There can be little doubt that the power to ". . . locate, lay out, construct and maintain" roads that was created by 48 U.S.C. § 322 includes within its scope the power to create public easements for the roads. *See* note 4 *supra; also see* State v. Alaska Land Title Association, 667 P. 2d at 721, note 8. To argue otherwise, is to fall prey to sophistry. If 48 U.S.C. § 322 did not include the authority to create public road easements to insure the public's right to use the roads that were constructed, there would be no guarantee that the public would even be able to use roads built under the authority of § 322. It is the creation and existence of the public road easement that protects the right of the traveling public to use the road. Furthermore, it is the initial act of "locating" or "laying out" the road that creates the easement. *See* Wright v. Woodcock, 29 A. 953, 954 (Me. 1893) and Town of Woodbridge v. Merwin, 244 A. 2d 57, 59 (Conn. 1968).

[6]The title company petitioners, at p. 14 of their petition for a writ of certiorari, allege that the Alaska Supreme Court's ruling on this question deprives them of their rights under section 138(b) of the Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 138(b), 84 Stat. 1713, 1735 (1970). Aside from the fact that this Act refers only to § 321(d) easements, it must be pointed out that this appears to be the first time in this case that this issue has been raised. It was never raised in the appellate proceedings before the Alaska Supreme Court. A look at the index of statutes and regulations in each of the three appellate briefs submitted by the petitioners in their appeal before the Alaska Supreme Court reveals no citation to the Federal-Aid Highway Act of 1970.

marily with the relationship of public roads in Alaska to a state statute and since it creates no conflict with federal law, the question presented here by the petitioner title companies does not rise to the level of a substantial federal question. Indeed, in a dispute over public road easements located within a state, particularly when the dispute turns on the relationship of a state statute to the easements, a persuasive case can be made that principles of federalism compel the conclusion that state law ought to be determinative of the matter.[7] Accordingly, the issuance of a writ of certiorari to review this question is not justified under 28 U.S.C.A. § 1257(3) (1966).

(b) The Second Question Presented by the Petitioners is not a Substantial Federal Question.

The second question raised by the title company petitioners grows out of their claim that easements or reservations for public roads in Alaska that do not actually appear on the face of the patent of the individual petitioner Richard L. Boysen cannot be utilized by the State of Alaska. To do so, they say, violates the six year statute of limitations set out in 43 U. S. C. A. § 1166 (1964) for vacating or annulling a patent. Inherent in this conclusion is the implication that the utilization of such an easement is the functional equivalent of vacating or annulling a patent.

Upon analysis, this argument has little merit. As the Alaska Supreme Court noted in *Alaska Land Title Association* the question does not turn on vacating or

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[7]There is much to be said for a rule of law grounded on principles of federalism that permits state courts to ultimately determine challenges to the validity of state road systems.

annulling a patent. The well established rule in these situations is that the patent contains an "implied-by-law-condition" that it is subject to the previously created easement. This rule can be traced back to this Court's holding in *United States v. Winans,* 198 U.S. 371 (1905) wherein it was held, at 382, that patents, though they maybe absolute in form, are subject to previously enacted laws. *Also see Hough v. Porter,* 98 P. 1083, 1093, 1094 (Or. 1909). Moreover, this Court has long held that conveyances by the United States are to be construed according to the law of the state where the land is located. *See United States v. Oklahoma Gas and Electric Co.,* 318 U.S. 206, 210, 211 (1943). Thus the Alaska Supreme Court properly concluded that the patent never transferred the property free from the previously created easement in the first place:

> The above and other authorities established that, by operation of law, land conveyed by the United States is taken subject to previously established rights-of-way where the instrument of conveyance is silent as to the existence of such rights-of-way. No suit to vacate or annul a patent in order to establish a previously existing right-of-way is necessary because the patent contains an implied-by-law condition that it is subject to such a right-of-way. Thus the statute of limitation expressed by 43 U.S.C. § 1166 does not apply.

State v. Alaska Land Title Association, 667 P.2d at 726, 727.

The Alaska Supreme Court's ruling on this question does not conflict with any federal cases.[8] Further, it

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[8]Leo Sheep Co. v. United States, 440 U. S. 668 (1979), a case relied on by the title company petitioners in their petition,

(Continued on following page)

concerns only public road easements located in Alaska. It cannot, therefore, be said to be a substantial federal question. As a result, the issuance of a writ of certiorari to review this question is not justified under 28 U.S.C. § 1257(3).

(c) The Third Question Presented by the Petitioners is not a Substantial Federal Question.

The third question raised by the title company petitioners rests on their claim that public land orders published in the Federal Register do not afford constructive notice in matters involving state land titles. The title company petitioners' argument is that publication in the Federal Register is "insufficient in law" within the meaning of 44 U.S.C.A. § 1507 (1969).

The Alaska Supreme Court responded to this argument by pointing out that regulations published in the Federal Register take on the character of law and that all persons are presumed to know the contents of the law:

(Continued from previous page)

is easily distinguished. Leo Sheep Co. involved a claim that a statutory grant of land to a railroad was subject to an implied "easement of necessity" pursuant to common law. The Court, at p. 680, held that the easement of necessity doctrine is most likely not available to the sovereign and, further, that the question turned on congressional intent of the Union Pacific Act of 1862, Act of July 1, 1862, 12 Stat. 489 (1862). In other words, the question resolved itself to whether Congress, in the Union Pacific Act of 1862, intended to create an easement. The case did not involve public road easements that were previously and unequivocally created by law pursuant to a public land order. At issue in the petitioners' question is not the existence of an implied easement but rather whether a patent contains an implied condition to the effect that it is subject to a public road easement that was specifically created by law prior to the issuance of the patent.

> The question here is whether public land orders, which appear in the Federal Register, impart constructive notice, thus preventing the property owner from claiming innocent purchaser status. We have in part IV of this opinion re-affirmed the holding of Hahn v. Alaska Title Guarantee Co., 557 P.2d 143 (Alaska 1976) that publication of a land order in the Federal Register is constructive notice of the order as that term is used in a title insurance policy. That holding is controlling here.
>
> Regulations published in the Federal Register take on the character of law. Farmer v. Philadelphia Electric Co., 329 F.2d 3, 7 (3rd Cir. 1964); United States v. Messer Oil Corp., 391 F.Supp. 557, 561-62 (W.D. Pa. 1975). All persons presumed to know the contents of the law. See Ferrell v. Baxter, 484 P.2d 250, 265 (Alaska 1971). In United States v. Messer Oil Corp., the district court indicated that regulations published in the Federal Register were sufficient to allow conviction of a criminal violation, 391 F. Supp. at 562. If Federal Register notice is sufficient for this purpose, it is sufficient notice to a landowner regarding easements that the federal government has reserved across his land. Thus, the publication of the land orders in the Federal Register imparted constructive notice and served to preclude subsequent innocent purchaser status.

State v. Alaska Land Title Association, 667 P.2d at 725, 726.

The ruling on this matter by Alaska's highest court does not conflict with any other federal court ruling. But aside from this, the holding, in effect, represents a judgment by Alaska's highest court that publication of a public land order creating a public road easement in Alaska is

deemed to be "sufficient" notice under Alaska law.[9] The decision on this question by the Alaska Supreme Court means no more than this. Other states are free to apply their own law to this question as it relates to their own individual land conveyancing rules. In the final analysis, the question of what kinds of notice are "insufficient in law" within the meaning of 44 U.S.C. §1507 resolves itself into a question of the application of state law.

Since the resolution of this question by the Alaska Supreme Court presents no conflict with any federal decision and since it is essentially one that is answered by the application of state law, the question is not one that rises to the level of a substantial federal question. As a consequence, the issuance of a writ of certiorari to review this question is not justified under 28 U.S.C. § 1257(3).

CONCLUSION

It is submitted that the petitioners have failed to sustain their burden under Supreme Court Rule 17 of establishing that there are special and important rea-

[9]Much of the force of this ruling is derived from the Alaska Supreme Court's holding in Hahn v. Alaska Title Guarantee Co., 557 P. 2d 143 (Alaska 1976). It is a well settled principle in our federal system that state law is often consulted to determine the meaning of federal law. *See* Reconstruction Finance Corporation v. Beaver County, 328 U. S. 204 (1946); *also see* 28 U.S.C.A. § 1652 (1966). The use of state law vis-a-vis federal law in matters involving real estate is particularly common. *See* Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co., 429 U. S. 363, 378, 379, 380 (1977); and U. S. v. Oklahoma Gas and Electric Co., 318 U. S. 206, 210, 211 (1943).

sons why the writ should be granted. None of the questions presented by the petitioners involve a substantial federal question. Nor is there any federal case which conflicts with the Alaska Supreme Court's decision in this matter. Moveover, the decision is plainly right and is fully supported by both state and federal law. Finally, the petitioners' questions concern themselves wholly with local concerns involving the construction of a state statute and the relationship of land conveyances in Alaska to public road easements in Alaska; questions that in our federal system are best left to Alaska's highest court. It is respectfully submitted, therefore, that the petitioners' request for a writ be denied.

Respectfully submitted,

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APPENDIX

48 U.S.C.A. § 322 (1952)

Location and construction of roads and trails

The Secretary of the Interior, or such officer, or officers, as may be designated by him, shall have the power, and it shall be his duty, upon his own motion or upon petition, to locate, lay out, construct, and maintain wagon roads and pack trails from any point on the navigable waters of Alaska to any town, mining or other industrial camp or settlement, or between any such town, camps, or settlements therein, if in his judgment such roads or trails are needed and will be of permanent value for the development of Alaska; but no such road or trail shall be constructed to any town, camp, or settlement which is wholly transitory or of no substantial value or importance for mining, trade, argicultural, or manufacturing purposes. Jan. 27, 1905, c. 277, § 2, 33 Stat. 616; May 14, 1906, c. 2458, § 2, 34 Stat. 192; June 30, 1932, c. 320, § 1, 47 Stat. 446.